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GATT--Legal Application of Safeguards in the Context of Regional Trade Arrangements and Its Implications for the Canada-United States Free Trade Agreement

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The General Agreement on Tariffs and Trade ("GATT"),[1] the most important multilateral treaty governing international trade,[2] permits regional trade arrangements such as the new Canada-United States Free Trade Agreement ("FTA").[3] Since World War II, many GATT contracting parties have concluded regional trade agreements, with the result that much of the world now conducts its trade under such agreements.[4]

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1. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. The official text of the agreement, last amended in 1965, is found in THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, U.N. Sales No. GATT/1986-4 (1986), and in 4 CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter GATT, BISD].

2. *See* Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 195 n.6 (1987); *see also* Ustor, *The MFN Customs Union Exception*, 15 J. WORLD TRADE L. 377, 379 (1981) (noting that GATT contracting parties and their trading partners transact at least 80 percent of world trade according to the rules of GATT).

3. Free-Trade Agreement, Dec. 22, 1987 - Jan. 2, 1988, Canada-United States, *reprinted in* 27 I.L.M. 281 (1988) [hereinafter Canada-U.S. FTA].

The United States and Canada had a natural incentive for negotiating a free trade agreement—each has been the other's largest trading partner. *See* Wolff, *The Case for a U.S.-Canadian Free Trade Agreement*, 10 CANADA-U.S. L.J.. 225, 227 (1985) (providing statistics). Both governments have believed that expanded access to each other's markets is mutually beneficial, improving and solidifying their economic relationship. *See id.* at 229.

4. The preamble to the GATT states that the governments of the contracting parties agreed to the GATT provisions:

> [r]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, and [b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the *substantial reduction of tariffs and*

One aspect of the Canada-United States agreement is of questionable legality under the GATT. Although the two countries have agreed to tear down most trade barriers between them,[5] they have retained the right to resurrect trade barriers against each other's imports when imports cause "serious injury" to domestic industries.[6] The GATT provisions that govern arrangements such as the Canada-United States FTA do not expressly permit countries to reimpose such "emergency" trade barriers, called "safeguards," against each other once the agreement is in force.[7]

How Canada and the United States handle the right they have reserved in their agreement could affect significantly the way other nations perceive the fairness of the Canada-United States agreement. The United States has demonstrated a growing interest in pursuing free trade agreements with other major

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other barriers to trade and to the elimination of discriminatory treatment in international commerce . . . .

GATT, *supra* note 1, preamble (emphasis added).

5. The United States and Canada will eliminate almost all mutual trade barriers within 10 years. *See generally* Canada-U.S. FTA, *supra* note 3. The treaty aims to eliminate "barriers to trade in goods and services between the territories of the Parties." *Id.* art. 102, para. a.

The FTA progressively eliminates customs duties, *id.* ch. 4, agricultural subsidies, *id.* ch. 7, restrictions on the export and import of energy products, *id.* ch. 9, and tariffs, *id.* ch. 4, and import restrictions for trade in automotive goods, *id.* ch. 10. The FTA also confers on both countries "national treatment" for investment and trade in services. *Id.* chs. 14-17.

6. Article 1102 of the FTA, entitled "Global Actions," provides:

> With respect to an emergency action taken by a Party on a global basis, the Parties shall retain their respective rights and obligations under Article XIX of the *General Agreement on Tariffs and Trade* subject to the requirement that a Party taking such action shall exclude the other Party from such global action unless imports from that Party are substantial and are contributing importantly to the serious injury or threat thereof caused by imports. For purposes of this paragraph, imports in the range of five percent to ten percent or less of total imports would normally not be considered substantial.

Id. art. 1102, para. 1. Paragraph 2 provides:

> A Party taking an emergency global action, from which the other Party is initially excluded pursuant to paragraph 1, shall have the right subsequently to include the other Party in the global action in the event of a surge in imports of such goods from the other Party that undermines the effectiveness of such action.

Id. art. 1102, para. 2.

7. *See* GATT, *supra* note 1, art. XXIV (governing customs unions and free-trade areas), *infra* text accompanying note 41 (quoting GATT art. XXIV, para. 8). Article XIX, governing "Emergency Action on Imports of Particular Products," is not listed among the article XXIV exceptions. *See id.* art. XXIV, para. 8.

trade partners.[8] The United States's ability to persuade other trade partners to consider such agreements might turn on United States actions in its agreement with Canada. Furthermore, if other nations believe that the Canada-United States agreement violates the GATT, those nations may question the fairness of the whole GATT regime at a time when nations increasingly are resisting the GATT requirements for freer trade.

This Note considers whether the GATT should permit countries entering into agreements such as the Canada-United States FTA to impose emergency trade barriers against each other. Part I describes the GATT free trade agreement provisions and the GATT provisions that allow the use of safeguard trade barriers outside the free trade agreement context. Part II examines whether emergency trade barriers constitute a legitimate exception to GATT requirements that countries seeking the advantages of free trade agreements remove all trade barriers between each other. Part III examines the language and policies of the GATT provisions to determine how the GATT should regulate the exception, if it is valid. The Note concludes that the GATT both permits and requires emergency trade barriers against trade agreement partners whenever countries participating in free trade agreements invoke safeguards against third countries.

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8. At the request of the United States Senate, the United States International Trade Commission currently is studying possible FTAs with Japan, Taiwan, South Korea, and Pacific Rim nations. *See ITC Members, on Tokyo Visit, Pessimistic About Potential Benefits of U.S.-Japan FTA*, [5 Current Reports] Int'l Trade Rep. (BNA) 1220, 1220-21 (Aug. 31, 1988). A study published by a Canadian institute recommends that the Canadian and United States governments consider a Pacific free trade agreement with Australia, New Zealand, and Japan. *See Five Country Pacific Free Trade Zone Alternative to GATT Round, Study Says*, [5 Current Reports] Int'l Trade Rep. (BNA) 1571, 1571 (Nov. 30, 1988).

The United States previously concluded a full, bilateral free trade agreement with Israel. *See* Free Trade Area Agreement, Apr. 22, 1985, Israel-United States, *reprinted in* 24 I.L.M. 653 (1985) [hereinafter U.S.-Israel FTA]; *see also* Recent Development, *Recent United States Trade Arrangements: Implications of the Most-Favored-Nation Principle and United States Trade Policy*, 17 LAW & POL'Y IN INT'L BUS. 209, 209 & n.2 (1985) (discussing United States-Israel free trade area).

One reason the United States sought a free trade agreement with Canada was the "precedent such an agreement . . . might have for the development of multilateral or bilateral free trade arrangements with other nations as well." Wolff, *supra* note 3, at 229. The United States, for instance, might apply the FTA rules governing trade in services in future multilateral negotiations. *Id.* As of 1986, the GATT did not regulate trade in services in any significant way. *See* J. JACKSON & W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 994 (2d ed. 1986).

I. SAFEGUARDS AND REGIONAL ARRANGEMENTS IN THE GATT CONTEXT

A. THE GATT AND THE MOST-FAVORED-NATION PRINCIPLE

The United States and Canada are both signatories to the GATT, a multilateral agreement governing trade relations among signatory countries.[9] The term *GATT* describes both the legal agreement in the form of a multilateral treaty and an international organization of ninety-six signatory nations.[10] The GATT treaty became the primary law of modern international trade as the result of post-World War II efforts to regulate international trade practices and to prevent the recurrence of the trade protectionism that was rampant before the war.[11] The negotiators originally intended to create a multinational representative body, the International Trade Organization, to regulate international trade.[12] In addition, the negotiators simultaneously drafted GATT to embody the results of tariff negotiations and general protective clauses to prevent nations from evading tariff commitments.[13] When the United States Congress failed to ratify the International Trade Organization, the negotiating countries reverted to the GATT as an existing legal framework.[14] Consequently, the GATT became the major

9. GATT, *supra* note 1, art. XXXII (defining parties to the agreement).

10. *See* Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443-44, n.2 (1988). The GATT organization maintains a secretariat in Geneva with several hundred employees. It maintains various committees and other working bodies, a standing agenda of daily meetings, and a mechanism for adjudicating legal disputes among members. *Id.* at 1444 n.2.

11. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 294-95. Recognizing that the extensive use of tariffs and quotas created havoc prior to World War II, the negotiating countries sought to establish a regime to promote trade and stability by international agreement on economic regulation. *See* J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 1.3, at 9 (1969).

12. See J. JACKSON & W. DAVEY, *supra* note 8, at 293-94.

13. *See id.* at 294-95 (noting also that negotiating nations drafted GATT, the ITO charter, and tariff concessions at Geneva Conference of 1947).

14. *See* R. GARDNER, STERLING-DOLLAR DIPLOMACY 379 (1956). The drafters intended the GATT to be a subsidiary agreement under the ITO charter, with GATT dependent for enforcement on the ITO. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 295. The United States negotiated the GATT under the authority of the Reciprocal Trade Agreements Act extension of 1945. *See id.*; Act of July 5, 1945, ch. 269, § 1, 59 Stat. 410. The United States, desiring to complete an ITO draft before its time-limited authority to make tariff agreements expired, signed, with the 21 other original members of GATT, a "Protocol of Provisional Application" in 1946 that made the GATT effective in 1948. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 295. Despite the ITO Charter's completion at the Havana conference in 1948, the United States Congress

vehicle for international trade regulation by default.[15]

An essential part of the GATT agreement is the most-favored nation ("MFN") principle, found in Article I.[16] The MFN principle, also known as nondiscrimination, requires that any GATT contracting party giving any trade advantage to any country also must give the same advantage to all other GATT contracting parties.[17] Conversely, MFN implies that a contracting party imposing any disadvantage or trade restriction on one contracting party must restrict trade with other countries in the same manner.[18] In essence, the MFN principle dictates that a country treat every GATT trading partner as well as it treats its most favored trading partner. MFN promotes the GATT's purpose of freer international trade by requiring that the benefit of removing or decreasing a trade barrier for one country be spread to all the GATT contracting parties. In some circumstances, however, the GATT provides exceptions to the MFN requirement.

B. ARTICLE XXIV'S RULES FOR REGIONAL TRADE ARRANGEMENTS

Article XXIV is a major exception to the MFN principle that governs the creation and operation of regional trade arrangements.[19] In regional trade arrangements, the signing countries agree to eliminate substantially all trade barriers among themselves to obtain the economic benefits of freer

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failed to accept the charter. *See id.* Without United States partcipation, the ITO never came into being. *See id.*

15. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 295-96. When the contracting parties amended the GATT to better adapt it to its new role, the United States accepted the amendments under the authority of the trade agreements acts. *See id.*

16. GATT, *supra* note 1, art. I, para. 1. The article provides that:

> [W]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . .[,] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other contracting parties.

Id.

17. *See* Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT'L L.J. 291, 296-97 (1988).

18. *See id.* at 297 (stating that MFN requires countries to "apply tariffs and other similar regulatory measures unconditionally and automatically on a non-discriminatory basis").

19. GATT, *supra* note 1, art. XXIV.

trade.[20] Article XXIV, however, allows states to remove trade barriers against countries that are members of the regional trade agreement without eliminating trade barriers against nonmember countries.[21]

Article XXIV authorizes two kinds of regional trade arrangements: customs unions and free trade areas.[22] A customs union is an economic union of two or more sovereign territories.[23] Each country in the union retains its own independence and sovereignty except for customs matters.[24] The countries involved in a customs union remove internal trade restrictions among themselves and become a single customs territory, applying common external tariffs and common trade regulations

20. *See* H. HAWKINS, COMMERCIAL TREATIES & AGREEMENTS: PRINCIPLES & PRACTICE 117 (1951). Removal of trade barriers allows nations better to share the benefits of mass production, efficient division of labor, and other resources. These advantages place nations that have eliminated trade barriers through a regional trade arrangement in a strong bargaining position when negotiating trade agreements with other countries. *Id.* at 118. Professor Hawkins argues that these benefits combine to improve the standard of living in nations belonging to the regional trade arrangement. *Id.* Further, Professor Hawkins asserts that the increased prosperity of the countries belonging to free trade arrangements fosters international trade and thus benefits the rest of the world. *Id.*

Customs unions are rare, despite their benefits, because their formation requires a level of economic union that is difficult for two or more countries to achieve. *See id.* at 119 (explaining that nations contemplating forming customs union must reconcile economic policy in such areas as "wages, prices, money, taxes, international trade, tariffs, employment," and labor laws). Nations belonging to customs unions necessarily surrender a degree of national sovereignty. Countries participating in customs unions must share customs revenues among themselves, reconcile diverse political ideologies, and abandon intense notions of nationalism and freedom of action. *Id.* Thus, customs unions "are never purely commercial." Haight, *Customs Unions and Free-Trade Areas Under GATT: A Reappraisal*, 6 J. WORLD TRADE L. 391, 392-93 (1972). Despite these barriers, customs unions can lead to a common market, free movement of capital and labor, a common currency, and ultimately, a political union harmonizing fiscal and social policy among participating countries. *Id.*

21. *See* J. JACKSON, *supra* note 11, § 24.1, at 576 (observing that "[t]he very nature of [a regional arrangement] involves a departure from the Most-Favored-Nation principle"). The negotiating countries excepted regional arrangements from MFN obligations because they believed that such arrangements liberalize trade and therefore do not conflict with the purpose of the GATT. *See* Recent Development, *supra* note 8, at 224-25.

Departing from the MFN obligation appears especially justified in the case of customs unions. *See* Haight, *supra* note 20, at 393 (arguing that MFN principle should not prevent nations from creating larger entities and that prior trading arrangements should not frustrate nations wishing to pool sovereignty by fully integrating their economies).

22. *See* GATT, *supra* note 1, art. XXIV, para. 5.

23. *See* H. HAWKINS, *supra* note 20, at 117.

24. *See id.*

to the products entering the customs union territory from third countries.[25] In a free trade area, the constituent territories also remove internal restrictions, but they do not establish common external tariffs or a common customs administration.[26] The Canada-United States agreement creates a free trade area in which each country agrees to eliminate or reduce trade barriers against the other while retaining its own system of trade barriers against third countries.

1. Basic Rule of Article XXIV: Elimination of Substantially All Trade Barriers

Although regional trade arrangements abrogate the MFN principle by allowing members of the arrangement to treat each other more favorably than nonmembers, the GATT drafters recognized that regional trade agreements can serve as stepping stones to freer world trade.[27] Regional trade

25. GATT, *supra* note 1, art. XXIV, para. 8(a).

Customs unions were an exception to the general principle of MFN even before GATT. *See* J. VINER, THE CUSTOMS UNION ISSUE 12 (1950). Some commentators argue that customary international law implies a customs union exception in every most-favored-nation clause of a commercial treaty, including those treaties GATT does not govern. *See* Ustor, *supra* note 2, at 380-81. Others disagree, however, maintaining that international law does not create such an exception. *See id.* at 380. Proponents of the implied exception argue that, because the GATT governs most world trade, states that accept GATT ratify the customs union exception of article XXIV. *Id.* at 380-81. Article 38 of the Vienna Convention on the Law of Treaties recognizes that, under traditional principles of public international law, treaty rules bind third states when those third states recognize them as rules of customary state practice. Vienna Convention on the Law of Treaties art. 38, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 334 (entered into force Jan. 27, 1980), *reprinted in* 8 I.L.M. 679 (1969).

Opponents of the impled exception counter that non-parties to the GATT do not apply article XXIV rules and that article XXIV, moreover, has not achieved the level of general application necessary to become a rule of customary international law. *See* Ustor, *supra* note 2, at 380-81. Former Hungarian ambassador Ustor concludes that despite some evidence that countries believe that an implied customs union exception to MFN obligations exists, state practice does not support characterizing an implied customs union exception as a rule of international law. *Id.* at 382-83.

26. *See* H. HAWKINS, *supra* note 20, at 117. The drafters of the ITO Charter first included FTAs as part of the "regional exception" to MFN obligations at the 1948 Havana Conference. *See* Charter for an International Trade Organization, Mar. 24, 1948, art. 44, U.N. Doc. E/Conf. 2/78, *reprinted in* U.N. Doc. ICITO/1/4 (1948), and in U.S. DEP'T OF STATE PUB. NO. 3206, COMMERCIAL POLICY SERIES NO. 113 (1948) [hereinafter Havana Charter]. The regional exception previously had included only customs unions.

27. *See* GATT, *supra* note 1, art. XXIV, para. 4 (stating that "[t]he contracting parties recognize the desirability of increasing freedom of trade by the

arrangements permit countries to adjust to the reduction of protective trade barriers by reducing barriers first with only a few countries. The GATT drafters also recognized, however, that some countries could use regional arrangements to gain unfair advantages with respect to nonmember trading partners.[28] Parties to a regional arrangement might hold an unfair advantage if they could use article XXIV as an excuse for forming "preference arrangements," in which members remove inter-member trade barriers for only a few imported products.[29] The GATT forbids preferential arrangements because they primarily protect inefficient producers of these few products in the member countries at the expense of producers of the products in nonmember countries.[30]

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development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements").

28. GATT article XXIV, paragraph 4, also states that "the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." *Id.*; *see also* J. JACKSON & W. DAVEY, *supra* note 8, at 455 (noting that negotiating nations feared other nations would abuse regional arrangements "to establish trade preferences, defeating the purpose of MFN").

29. *See* Dam, *Regional Economic Arrangements and the GATT: The Legacy of a Misconception*, 30 U. CHI. L. REV. 615, 633 (1963).

30. A preference agreement "is set up for the purpose of conferring a privilege on producers within the system and imposing a handicap on external competitors." C. WILCOX, A CHARTER FOR WORLD TRADE 70 (1949). Preferential arrangements directly contravene the MFN principle codified in GATT article I. *See* Dam, *supra* note 29, at 616. Nonetheless, an article I "grandfather clause" permits certain preferential arrangements existing at the time of GATT formation. *Id.*; *see* GATT, *supra* note 1, art. I, paras. 2-3.

Some commentators have questioned the validity of the GATT's distinction between regional arrangements and preferential arrangements. Professor Dam, for example, argues:

> Since the tariff reductions inherent in such a preferential arrangement might be considered a movement toward free trade, albeit not so dramatic as that produced by a customs union or free-trade area, and since such a preferential arrangement by definition involves less discrimination against nonmembers than a customs union or free-trade area, the justification for proscribing such arrangements absolutely is not clear. Certainly it is strange to state, as Article XXIV in effect declares, that discrimination is forbidden unless it is one hundred per cent effective.

Dam, *supra* note 29, at 633-34 (footnote omitted).

Preferential arrangements are viewed as shelters for inefficient industries in the member countries of the preferential arrangement. *See* H. HAWKINS, *supra* note 20, at 114. Preferential trade arrangements harm nonmember countries because these nations suffer economic loss when parties to the agreement divert trade to themselves and exclude outsiders. *See id.* at 124-25. Additionally, preferential traders often increase general tariff rates, which negatively affects nonmembers' trade. *Id.* at 114. Preference arrange-

To prevent valid regional trade arrangements from becoming preference arrangements, article XXIV imposes stringent requirements on the formation of regional agreements. First, states making such agreements must eliminate restrictions with respect to "substantially all the trade" between the countries."[31] Article XXIV permits interim agreements that outline the gradual elimination of trade barriers.[32] An interim agreement, however, must provide "a plan and schedule for the formation of such a customs union or . . . free trade area within a reasonable length of time."[33] Additionally, states may not im-

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ments therefore tend to perpetuate high-cost production for participants and to harm outsiders without significantly expanding production. *Id.* at 113. Because industry management and employees in the member countries to a preference arrangement desire to maintain the status quo, they oppose trade barrier reductions that could significantly readjust production and create economic efficiency. *See* H. HAWKINS, *supra* note 20, at 125. Thus, preferential trade arrangements do not improve productivity and prosperity. *Id.* In negotiating the GATT, the United States sought to dismantle trade preferences. *See* J. JACKSON, *supra* note 11, § 24.1, at 576.

A customs union or FTA, in contrast, creates a wider trading area in which participating countries remove *all* trade restrictions. *See* C. WILCOX, *supra*, at 67. Fewer obstacles to competition lead to more efficient allocation of resources and, ultimately, to increased production and enhanced standards of living. *Id.*

The international community, including the United States, recognized regional trade arrangements as a firmly established exception to MFN obligations before the formation of GATT. *See* J. VINER, *supra* note 25, at 6-14 (giving brief history of customs unions and MFN principle). At the GATT negotiations, the United States strongly opposed preferential arrangements, but nevertheless conceded the importance of an exception for certain kinds of regional arrangements. *See* J. JACKSON, *supra* note 11, § 24.1, at 576-77. In its proposed draft of article XXIV, the United States expressly exempted certain kinds of regional arrangements from general MFN obligations. *Id.* § 24.1, at 577. According to one commentator, the United States negotiators allowed the exemption of FTAs and customs unions in the GATT, despite their vehement dislike of preferential arrangments and trade discrimination, in order to promote European recovery after World War II. Culbert, *War-Time Anglo-American Talks and the Making of the GATT*, 10 WORLD ECON. 381, 396 (1987).

31. GATT, *supra* note 1, art. XXIV, paras. 8(a)(i), 8(b). GATT contracting parties have not consistently defined *substantially all trade*. *See* J. JACKSON, *supra* note 11, § 24.7, at 607-10. Removing 80 percent of all trade barriers probably would meet the GATT requirement. *See* Dam, *supra* note 29, at 635.

32. GATT, *supra* note 1, art. XXIV, para. 5 (providing that "the provisions of this Agreement shall not prevent . . . the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area").

33. GATT, *supra* note 1, art. XXIV, para. 5(c). The contracting parties to the GATT have not clearly defined *reasonable length of time*. *See* J. JACKSON, *supra* note 11, § 24.6, at 605-07. Several working parties have suggested that a period of 10 to 20 years would be reasonable time. *See id.* at 606.

Representatives of several signatories compose working parties. They discuss and review actions of other signatories that affect the other contracting

pose trade barriers against nonmember countries that are more restrictive than the barriers existing before the formation of the agreement.[34] States also must notify the other GATT contracting parties of their intention to enter into a regional trade agreement,[35] provide them with information relating to the agreement,[36] and, theoretically, obtain their approval of the arrangement.[37]

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parties. *See* Note, *The U.S.-Israel Free Trade Area: Is it GATT Legal?*, 1 GEO. WASH. J. INT'L L. & ECON. 199, 205 n.46 (1985).

While nations are negotiating a regional trade arrangement, the nations can take advantage of article XXIV by operating under an "interim agreement." GATT, *supra* note 1, art. XXIV, paras. 5(c), 7(a)-(c). Interim agreements allow nations gradually to remove trade barriers and avoid the disturbance that the sudden removal of trade barriers can cause to their economies. *See* J. VINER, *supra* note 25, at 125. Interim agreements thus are advantageous because the removal of trade barriers can create shifts in production that adversely affect employment and cause other hardships to the population. *See* H. HAWKINS, *supra* note 20, at 118. By allowing the gradual establishment of regional arrangements, the GATT furthers its objective of encouraging regional arrangements. *See* J. VINER, *supra* note 25, at 125. The GATT automatically exempts valid interim agreements from the requirements of article XXIV. *See* Note, *supra* note 8, at 207 n.64.

A two-thirds majority of the GATT contracting parties can approve proposed regional trade arrangements that do not comply fully with article XXIV's requirements by waiving the requirements, "provided that such proposals lead to the formation of a customs union or a free trade area in the sense of this Article." GATT, *supra* note 1, art. XXIV, para. 10.

Similarly, a two-thirds majority can waive GATT obligations "[i]n exceptional circumstances not elsewhere provided for in this Agreement." GATT, *supra* note 1, art. XXV, para. 5 (also providing that two-thirds majority must "comprise more than half of the contracting parties"). Many nations have obtained waivers for regional arrangements. As of 1974, contracting parties had presented 34 regional arrangements to the GATT for approval. *See* Koh, *supra* note 2, at 231 n.140. The GATT granted waivers to 11 of those 34 regional arrangements. *Id.* at 231 n.142.

34. GATT, *supra* note 1, art. XXIV, para. 5(a)-(b).

35. *Id.* at para. 7(a).

36. *Id.*

37. *Id.* at para. 7(b). Paragraph 7(b) provides:

> If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

Id.

GATT's enforcement of article XXIV has a checkered history; since the formation of GATT, no regional arrangement has conformed completely to article XXIV rules.[38] The GATT contracting parties, however, never have rejected a regional arrangement.[39]

2. Exceptions to the General Rule

Although the drafters of article XXIV believed that requiring members of a regional trade arrangement to eliminate substantially all barriers among them would reduce the abuses of "preferential" arrangements, the drafters neverthless recognized the necessity for some exceptions to the remove-all-barriers rule. Paragraph eight of article XXIV therefore provides six exceptions that refer to six other GATT articles.[40] Article XXIV defines regional arrangements as "customs territories" in which "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, and XX) are eliminated with respect to substantially all the trade between the constituent territories . . . in products originating in such territories."[41] Article XI permits the imposition of quotas necessary to protect agricul-

38. *See* Raworth, *Economic Integration, the GATT and Canada-United States Free Trade*, 18 OTTAWA L. REV. 259, 271 (1986).

39. Normally, parties raise objections to nonconforming agreements and then tolerate the arrangements. *Id.* As a result, two-thirds of the contracting parties belong to regional arrangements that are inconsistent with GATT requirements. *Id.* Commenting on this state of affairs, Professor Jackson asserts that article XXIV is "largely irrelevant." *Id.* (citing J. JACKSON, J. LOUIS & M. MATSUSHITA, IMPLEMENTATING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 621 (1984)).

Some commentators argue that article XXIV's vague requirements that parties eliminate trade barriers for "substantially all the trade" within a "reasonable length of time" cause the compliance problem. *See* Haight, *supra* note 20, at 397 (quoting GATT, *supra* note 1, art. XXIV, paras. 8(b), 5(c)). Haight argues that "[no] other critically important provisions of the GATT leave such difficult tasks of interpretation to the judgment of the Contracting Parties." *Id.* In Professor Dam's view, although "Article XXIV appears, on first impression, to set forth a precise set of rules for determining the circumstances under which regional arrangements will be permitted[, t]he apparent precision is quite illusory." Dam, *supra* note 29, at 619.

40. GATT, *supra* note 1, art. XXIV, para. 8. The exceptions to the prohibition on trade barriers are found in the following GATT articles: article XI (Exceptions to the General Elimination of Quantitative Restrictions); article XII (Restrictions to Safeguard the Balance of Payments); article XIII (Nondiscriminatory Administration of Quantitative Restrictions); article XIV (Exceptions to the Rule of Non-discrimination); article XV (Exchange Arrangements); and article XX (General Exceptions). GATT, *supra* note 1.

41. GATT, *supra* note 1, art. XXIV, paras. 8(a)(1), 8(b).

tural price support programs; articles XII, XIII, XIV, and XV allow trade and monetary restrictions for balance-of-payments purposes, and article XX permits restrictions needed for reasons of health, safety, law enforcement, and similar "police power" purposes.[42]

The exceptions include many of the exceptions to the MFN rule and GATT's general prohibition of nontariff trade barriers that were well-established in pre-GATT trade agreements.[43]

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42. *See* GATT, *supra* note 1, arts. XI, XII, XIII, XIV, XV, XX.

43. *See* C. WILCOX, *supra* note 30, at 180-84. An example of pre-GATT exceptions is the exception to the general prohibition of quantitative restrictions (quotas) on imports, which allows nations to enforce the classification and grading of commodities. *Id.* A similar exception, embodied in GATT article XI, applies to regional arrangements under the GATT. GATT, *supra* note 1, art. XI, para. 2(b). Pre-GATT treaties also frequently included provisions analogous to those in GATT article XX, which exempt the protection of national treasures or measures necessary to protect public health or safety from commitments to reduce trade barriers. *See* C. WILCOX, *supra* note 30, at 181; Havana Charter, *supra* note 26, art. 45, para. 1(a). Article XX is an exception to the article XXIV requirement that regional agreements remove all trade barriers. *See supra* note 7.

The article XXIV list includes temporary exceptions, such as the article XI provision that permits export restrictions to rectify critical shortages of food stuffs or other essentials. *See* GATT, *supra* note 1, art. XI, para. 2(a). Article XX provisions allow restrictions on the distribution of products in short supply. *See* GATT, *supra* note 1, art. XX, para. j. The Havana Charter also contained provisions for the control of prices and the liquidation of war surpluses and industries. Havana Charter, *supra* note 26, art. 45, para. 1(b).

The provisions in GATT articles XII through XV permit the use of quotas for balance-of-payment problems. The analogous Havana Charter provisions appear in articles 21 through 24. Havana Charter, *supra* note 26.

The drafters probably viewed the temporary provisions as transitional ones, designed to aid countries through the economic difficulties of the postwar period. *See* C. WILCOX, *supra* note 30, at 181. Various criteria, procedures, time limitations, and additional obligations limit the use of these provisions. *See id.* at 183-84. The Havana Charter articles also required parties to obtain International Monetary Fund approval before invoking some of the temporary exceptions. *See id.*

The United States's original charter proposal for an international trade organization contained an exception to the quantitative restrictions prohibition to allow nations to adjust for balance of payments problems. *See* J. JACKSON, *supra* note 11, § 26.2, at 678. The provision did not change significantly during the GATT and ITO Charter negotiations. *See id.* § 26.2, at 679. Professor Brown notes that the balance of payments exceptions codified in the Havana Charter are the only provisions of major importance which "allow members resorting to the balance-of-payments exception to apply quantitative restrictions in a discriminatory manner . . . [and are the only ones] that apply specifically and solely to a postwar transition period." W. BROWN, THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 197-98 (1950).

The Havana Charter reflects this concern in article 21, which addresses restrictions to safeguard the balance of payments, and in article 23, which addresses exceptions to the rule of non-discrimination:

The negotiating history does not explain why the drafters chose those particular exceptions and neglected other common exceptions, such as article XXI, which allows restrictions for the protection of security interests, and article XIX safeguards.[44]

> The Members recognize that in the early years of the Organization all of them will be confronted in varying degrees with problems of economic adjustment resulting from the war. During this period the Organization shall, when required to take decisions under this Article or under Article 23, take full account of the difficulties of post-war adjustment and of the need which a Member may have to use import restrictions as a step towards the restoration of equilibrium in its balance of payments on a sound and lasting basis. . . . The Members recognize that the aftermath of the war has brought difficult problems of economic adjustment which do not permit the immediate full achievement of non-discriminatory administration of quantitative restrictions . . . .

Havana Charter, *supra* note 26, art. 21, para. 4(a), art. 23, para. 1(a).

The Havana Charter's exception for balance of payment quantitative restrictions had costs for those states invoking the exception. The exception "[gave] rise to 'secondary' rights and obligations." W. BROWN, *supra*, at 191.

44. The parenthetical list of exceptions first appeared in the final March 1948 draft of the Havana Charter, after being added at the final plenary conference. Havana Charter, *supra* note 26, art. 44, para. 4. Like GATT article XXIV, the Havana Charter defines the exceptions to the requirements for regional arrangements by reference to other charter articles. *Id.* These articles have direct counterparts in the GATT. No prior drafts of the Havana Charter provided these exceptions. *See* U.S. DEP'T OF STATE PUB. NO. 2927, COMMERCIAL POLICY SERIES NO. 106, DRAFT CHARTER OF THE INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, art. 42 (1947) [hereinafter GENEVA DRAFT]; *U.N. Conf. on Trade and Employment: Report of the Drafting Committee of the Preparatory Committee*, art. 38, para. 5, U.N. Doc. E/PC/T/34 (1947) [hereinafter *New York Draft*] (U.N. Archives Microfilm ESCOR Documents); U.S. DEP'T OF STATE PUB. NO. 2728, COMMERCIAL POLICY SERIES NO. 98, PRELIMINARY DRAFT CHARTER FOR THE INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, art. 38, para. 5 (1946) [hereinafter LONDON DRAFT]; U.S. DEP'T OF STATE PUB. NO. 2598, COMMERCIAL POLICY SERIES NO. 93, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, art. 33, para. 4 (1946) [hereinafter SUGGESTED CHARTER]. Similarly, the October 30, 1947, GATT text does not include the article XXIV exceptions. GATT, *supra* note 1, art. XXIV.

The parenthetical exceptions first appeared in the negotiating documents of the Joint Sub-Committee on Tariff Preference in a draft revision of article 42. *U.N. Conf. on Trade and Employment: Draft Revision of Article 42*, para.4, U.N. Doc. E/Conf.2/C.2&3/A/13 (1948) (U.N. Archives Microfilm ESCOR Documents). No account of committee discussions accompany the draft. *Id.* Subsequent documents include the parenthetical exceptions without explanation. *See, e.g., U.N. Conf. on Trade and Employment: Report of Working Party to Joint Committee on Articles 15, 16 and 42*, Annex 1, para. 4, U.N. Doc. E/Conf. 2/C. 2&3/A/14 (1948) (U.N. Archives Microfilm ESCOR Documents); *U.N. Conf. on Trade and Employment: Joint Sub-Committee Report to Committee III on Articles 16 and 42*, para. 27, U.N. Doc. E/Conf. 2/C.3/78 (1948) (U.N. Archives Microfilm ESCOR Documents); *U.N. Conf. on Trade and Employment: Draft Articles 16, 42, 42A and 42B as Adopted by Committee III*, para. 4,

C. ARTICLE XIX SAFEGUARDS

1. The Purpose and Requirements of Article XIX

Conspicuously absent from the list of exceptions to article XXIV is GATT article XIX, entitled "Emergency Action on Imports of Particular Products." Known as the "escape clause,"[45] article XIX allows a GATT contracting party, under certain emergency circumstances, to raise trade barriers, also called "safeguards,"[46] that otherwise would violate trade obligations or concessions negotiated under the GATT. To invoke these provisions, the contracting party must need the barriers to protect its own domestic industries from products imported into the contracting party's territory "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers . . . of like or directly competitive

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U.N. Doc. E/Conf. 2/C.3/85 (1948) (U.N. Archives Microfilm ESCOR Documents).

45. *See* J. JACKSON, *supra* note 11, § 23.1, at 553. GATT drafters included article XIX largely at the insistence of the United States. *See* C. WILCOX, *supra* note 31, at 182-83. The United States negotiators conditioned their acceptance of the Charter on the inclusion of the safeguards exception and a provision allowing parties to apply quotas against agricultural products as a response to domestic price support programs. Article XIX of the GATT codifies the safeguards exception; article XI, paragraph 2(c), codifies the agricultural quota provision. *See id.* The United States began demanding escape clauses in all of its international trade agreements in the 1940s. *See* Exec. Order No. 9,832, 3 C.F.R. 624, 625 (1948); Trade Agreements Extension Act of 1951, Pub.L. No. 50-141, 1951 U.S. CODE CONG. & ADMIN. NEWS (50 Stat.) 70. GATT article XIX is modeled on the United States-Mexican Trade Agreement of December 23, 1942. Trade Agreement, Dec. 23, 1942, United States-Mexico, 57 Stat. 833-51, E.A.S. No. 311 (effective Jan. 30, 1943).

GATT article XIX developed from a draft safeguards provision submitted by the United States. *See* SUGGESTED CHARTER, *supra* note 44, art. 29; R. HUDEC, THE GATT LEGAL SYSTEM & WORLD TRADE DIPLOMACY 14-15 (1975).

46. According to one commentator, international trade law frequently uses the terms safeguard and escape clause synonymously. *See* Note, *A Proposed Modification of U.S. Import Relief Measures in the Context of a U.S.-Canada Free Trade Agreement: Safeguard, Countervail and Antidumping*, 17 GA. J. INT'L & COMP. L. 99, 102-03 (1987). Technically, both terms refer to relief that permits a country to "escape" from concessions to reduce trade barriers. *Id.* A true escape clause requires a causal relationship; to invoke the escape clause successfully, a country must attribute an influx of injurious imports to a trade concession. *Id.* at 103. For instance, section 201 of the United States Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1982), provides that United States industries seriously injured by imports may obtain temporary relief from all imports of a particular product. *See* Note, *supra*, at 101-03. Section 201 is not a true escape clause, however, because it permits industries to nullify a concession without presenting evidence that the concession is causing the influx of injurious imports. *Id.* at 103.

products."[47] By design, article XIX allows governments to aid industries that are "no longer internationally competitive."[48] GATT scholars generally agree that, outside the regional trade arrangement context, safeguard measures must apply according to the MFN principle.[49] Thus, a country invoking safeguards against a certain product to protect a domestic industry must apply those safeguards to imports of that product from every country.

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47. GATT, *supra* note 1, art. XIX, para. 1(a). In addition to these requirements, the GATT requires that the importation be an "unforeseen development" that results from an "obligation incurred" under the GATT, usually a trade concession reducing or eliminating a trade barrier. This requirement has had little meaning, however, since the *Hatters' Fur Case*. REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, U.N. Sales No. GATT/1951-3 (1951). In that case, Czechoslovakia challenged the United States's withdrawal of a negotiated trade concession for hatters' furs. The United States defended the withdrawal, claiming that an unforeseen development—change in ladies' hat styles—had increased imports. *Id.* at 10. Despite its finding that fashions are subject to constant change and that the United States had known this when it granted the trade concession, the decisionmakers concluded that the United States had satisfied the unforeseen developments criteria, because it could not have foreseen the *degree* to which the fashion change would increase imports. *Id.* at 12. After the *Hatters' Fur Case*, nations apparently can justify safeguards based on *any* substantial increase in imports, even foreseeable increases, because the degree of a given import's impact always will be "unforeseeable." *See* J. JACKSON, *supra* note 11, § 23.3, at 561.

48. *See* Merciai, *Safeguard Measures in GATT*, 15 J. WORLD TRADE L. 41, 41 (1981). The GATT drafters chose to provide more protections to industries in importing countries than in exporting countries. *Id.* By providing participating governments a means to escape economic injury, the GATT safeguards encourage greater commitment to free trade. *Id.*

49. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 604 (arguing that a GATT panel would rule that article XIX remedies require MFN treatment). The matter has been the subject of considerable discussion. *See, e.g.*, Bronckers, *Reconsidering the Non-Discrimination Principle as Applied to GATT Safeguard Measures: A Rejoinder*, 1983/2 LEGAL ISSUES OF EUR. INTEGRATION 113 (suggesting new safeguards code); Bronckers, *The Non-Discriminatory Application of Article XIX GATT: Fact or Fiction*, 1981/2 LEGAL ISSUES OF EUR. INTEGRATION 39 (arguing that article XIX is at best ambiguous as to its nondiscriminatory application); Koulen, *The Non-Discriminatory Application of GATT Article XIX(1): A Reply*, 1983/2 LEGAL ISSUES OF EUR. INTEGRATION 87 (arguing that article XIX permits only non-discriminatory safeguards).

The language of article XIX does not explicitly require nondiscriminatory application. Documents pertaining to the drafting of article 40 of the Havana Charter, the direct predecessor of GATT article XIX, support an implicit MFN requirement. In particular, an interpretive note to article 40 of the Havana Charter states that any "suspension, withdrawal or modification" pursuant to the safeguard provisions "must not discriminate against imports from any Member country." Havana Charter, *supra* note 26, Annex P (*ad* art. 40).

Even though article XXIV does not list article XIX as an exception to the required elimination of substantially all trade barriers between members of a regional agreement, article 1102 of the Canada-United States FTA[50] and several other regional agreements expressly permit the application of article XIX safeguards against regional arrangement partners.[51] The absence of an express article XIX exception to article XXIV in the GATT could be read to suggest that the United States-Canada FTA safeguard provision violates the GATT.

2. Applying an Article XIX Exception

Even if article XIX is a legal exception to article XXIV's requirement that regional trading partners remove "substantially all trade barriers"—despite the lack of explicit article XXIV permission—the application of safeguards among members of a free trade arrangement remains a problem. Article XXIV merely permits countries belonging to regional trade ar-

50. *See supra* note 6 (quoting article 1102 language).

51. Some major regional arrangements among industrialized countries that provide for safeguards include: Convention Establishing the European Free Trade Association, Jan. 4, 1960, art. 20, 370 U.N.T.S. 3; Agreement Establishing a Free Trade Area, June 5, 1966, United Kingdom and Northern Ireland-Ireland, art. XIX, 1966 Gr. Brit. T.S. No. 31, 565 U.N.T.S. 58, *reprinted in* 5 I.L.M. 321 (1966); Israel-United States: Free Trade Area Agreement, Apr. 22, 1985, art. 5, *reprinted in* 24 I.L.M. 653 (1985); Agreement Between the European Economic Community and the Republic of Austria, July 22, 1972, art. 27 (2), 1 Collection of the Agreements Concluded by the European Communities, 7, 16 (1977), *reprinted in* ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW, Vol. B II (European Community Treaties), at 1312-198 (K. Simmonds ed. 1974); New Zealand-Australia: Closer Economic Relations Trade Agreement, Mar. 28, 1983, art. 17, New Zealand Treaty Series 1983, No. 1, A. 20, *reprinted in* 22 I.L.M. 945, 967 (1983).

The only other full FTA to which the United States is a party, the U.S.-Israel FTA, also contains a safeguards provision. U.S.-Israel FTA, *supra* note 8. Article 5 of the U.S.-Israel FTA provides for "Relief from Injury Caused by Import Competition." The article implicitly allows for the "suspension of the reduction or elimination of any duty provided for by this Agreement" when the "serious injury or threat thereof . . . is substantially caused by . . . the reduction or elimination of duty provided for by this Agreement," *id.* art. 5, para. 2, and only after the "importing Party . . . consult[s] with the other Party in accordance with Article 18 before taking any action affecting the trade of the other Party," *id.* art. 5, para. 1. In addition, "[w]hen, in the view of the importing Party, the importation of a product from the other Party is not a significant cause of the serious injury or threat thereof . . . , the importing Party may except the product of the other Party from any import relief that may be imposed with respect to imports of that product from third countries." *Id.* art. 5, para. 3. Thus, when the importing country imposes safeguard measures against third countries, it might exempt the other party to the agreement from the import relief.

rangements to apply the enumerated protective measures against regional trade partners. The article XXIV text does not indicate whether measures *must* be applied to regional partners when they are applied against other countries not parties to the agreement.[52] In article 1102 of the Canada-United States agreement, the parties retain an option to apply article XIX safeguards against each other when they apply safeguards against third parties.[53] Whether, in those circumstances, the countries not only *may*, but *must*, impose safeguards against each other to comply with article XIX law is an open question.

The potential volatility of this issue became evident when the European Economic Community ("EEC")[54] and the European Free Trade Area ("EFTA")[55] sought GATT working party[56] approval for their regional trade agreements. Although the working party did not reach a final conclusion, some members of the working party believed that the application of safeguards against nonmember states, but not against member states, violated the GATT MFN principle.[57] The EEC contested this view.[58]

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52. For example, article XXIV states that regional trade arrangement members may abrogate the general rule of eliminating all trade barriers when necessary to impose balance of payment protections under article XIII. GATT, *supra* note 1, art. XXIV. Article XXIV does not clarify, however, whether members must apply balance of payments protections equally to members and nonmembers. Thus, the problem of how to apply an article XIX exception is equally relevant to all of the article XXIV, paragraph 8, exceptions.

53. *See supra* note 6 (quoting article 1102 language).

54. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 4.

55. Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3.

56. *See supra* note 33 (describing working parties).

57. *See* GATT, BISD, *supra* note 1, supp. 20, at 156 (examining Austrian Agreement); *id.* at 166-69 (examining agreement with Iceland); *id.* at 181 (examining agreement with Portugal).

58. *See id.* supp. 20, at 156, 169, 181, 194, 207. The working party assigned to the EFTA agreement held the opposite view. *See id.* supp. 9, at 79 (examining Stockholm Convention).

Discussing this disagreement, Professor Raworth asserts that because the language of article XXIV, paragraph 8(b), fails to list article XIX as an exception to the removal of trade barriers in a free trade area, it is doubtful that application of safeguard measures against FTA partners violates the MFN principle. Raworth, *supra* note 38, at 270. Another commentator similarly has speculated that "although the GATT requires the application of safeguard measures on a most-favored-nation basis, exempting Canada from that rule would likely be consistent with the GATT article XXIV requirement that free trade areas eliminate substantially all 'restrictive regulations of commerce.'" Note, *supra* note 46, at 107. Professor Koulen notes, however, that the text of article XXIV, paragraph 8, is ambiguous. Koulen, *supra* note 49, at 102. If article XXIV's drafters intended to exempt other members of a regional ar-

Thus, the Canada-United States agreement may violate the GATT in two ways. First, the agreement allows the two countries to apply article XIX safeguard measures against each other, even though GATT article XXIV fails to list article XIX as an exception to the general rule that members of a free trade arrangement must eliminate substantially all trade barriers among them.[59] Second, even if article XIX constitutes an implied exception to article XXIV, the Canada-United States agreement may violate article XIX because it does not require the two countries to apply the safeguards against each other whenever they apply them against third countries.[60]

D. The Importance of Conforming with GATT

Canadian and United States policymakers might be tempted to consider the GATT legality of the Canada-United States FTA unimportant. No one is likely to challenge the agreement,[61] and GATT's past enforcement of article XXIV requirements has been lax.[62] Conforming the Canada-United States FTA to GATT rules, however, is important to both coun-

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rangement from the restrictions of article XIX, paragraph 1, he argues, it is difficult to understand why article XXIV, paragraph 8, refers to article XIII, which provides for nondiscriminatory application of quantitative restrictions. *Id.* Given this ambiguity, Professor Koulen finds it unsurprising that the nexus between article XXIV and article XIX remains unsettled. *Id.*

59. *See supra* notes 40-45 and accompanying text. GATT contracting parties retain their right to invoke article XIX safeguard measures upon entry into a regional arrangement. Neither article XIV nor article XXIV forbids countries belonging to regional arrangements from invoking safeguards against nonmember countries. *See* Koulen, *supra* note 49, at 102 (stating that "the disagreement concerns the question whether Article XXIV can be invoked as a valid reason for making an *exception* to the requirement of nondiscriminatory application of Article XIX (1)").

GATT scholars generally agree that article XIX applies as an exception during any interim agreement, provided that member countries are phasing out trade restrictions. They reason that the interim agreement operates during a transitional period when the full paragraph 8(b) requirements do not yet apply. *See, e.g.*, Raworth, *supra* note 38, at 270.

60. *See supra* note 57 and accompanying text. The Canada-United States FTA therefore reflects a tension between GATT article XXIV, which apparently does not allow countries in a free trade agreement to apply safeguard measures against each other, and article XIX, which requires countries to invoke safeguard measures equally against all countries where the damaging imports originate.

Nothing in the text of article XIX indicates that contracting parties belonging to regional trade arrangements should apply safeguard provisions differently to regional trade partners.

61. *See* Koh, *supra* note 2, at 230-31 & nn.139-40.

62. *See supra* notes 38-39 and accompanying text.

tries. In recent years, the United States has sought to improve its credibility among the GATT contracting parties in the hope of encouraging broader compliance with the GATT.[63] United States compliance with GATT rules will enhance this credibility. Meaningful GATT compliance in a free trade agreement with the United States also benefits Canada. Because Canada currently depends heavily on trade with the United States, it may achieve greater stability, autonomy, and growth by expanding its trade to other international markets.[64] Canada could achieve such trade diversification best through multilateral trade negotiations in accordance with a GATT system of rules that GATT contracting parties recognize and follow.[65] For Canada and the United States openly to flout GATT rules in their joint free trade agreement might undermine article XXIV rules or encourage other states to enter openly "preferential" trade arrangements.[66] In addition, resolution of the long-disputed article XXIV issue will help existing and future free trade agreements function within the GATT system. Thus,

63. The United States wishes to bolster its credibility as a strong proponent of GATT and as a critic of other free trade arrangements. *See* Recent Development, *supra* note 8, at 228. Despite initial hesitation, the United States "has recently been almost alone in seeking a more conscientious application of the rules." Haight, *supra* note 20, at 399.

64. Canada's participation in the Canada-United States FTA is likely to facilitate development of a new set of principles for international trade, which could lead to freer trade with other countries. *See* Wolff, *supra* note 3, at 229-30. In addition, Canada will benefit from readier access to the vast United States market, especially because geography links the countries. Unhindered by tariff barriers, newly developed technology will transfer easily, thus improving both productivity and efficiency. *Id.*

65. *See* Raworth, *supra* note 38, at 280-81 (noting importance of Canada-United States agreement covering "substantially all trade").

66. According to one commentator, if the United States breaches the requirements of article XXIV, other nations may feel free to form single commodity "free-trade" arrangements or preferential agreements. *See* Recent Development, *supra* note 8, at 228.

In addition, regional trade arrangements are potentially politically sensitive. Professor Dam notes that the "world-wide impact of customs unions makes their creation and implementation of common concern to all Contracting Parties." Dam, *supra* note 29, at 637. Although article XXIV allows abrogation of the MFN principle in the formation of a regional trade arrangement, countries not parties to the agreement understandably may fear trade diversion when the regional trade area is formed; the products of those countries will remain subject to current import restrictions, while tariffs and quotas will no longer burden the products traded between members of the regional arrangement. This would occur if two countries formed a free trade area, but one country bought from the other, now tariff-free, what it once had purchased from a nonmember importer still subject to tariffs. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 455.

determining the proper application of safeguards in a regional agreement will both clarify and strengthen article XXIV.

II. THE LEGITIMACY OF ARTICLE XIX SAFEGUARDS AS AN EXCEPTION TO ARTICLE XXIV

The first step in evaluating the GATT legality of article 1102 of the Canada-United States FTA is to consider whether article XIX safeguards provide a legitimate exception to article XXIV's requirement that members of regional trade arrangements remove trade barriers among themselves. Although the omission of an article XIX exception from article XXIV arguably precludes the application of safeguards against regional trade partners, analysis reveals no apparent reason for the omission. Policy considerations and the practical consequences of acknowledging safeguards as a valid exception compel the conclusion that article XIX is a legitimate exception to article XXIV requirements.

A. REASONS FOR THE ABSENCE OF AN EXPRESS ARTICLE XIX EXCEPTION

The text of article XXIV does not reveal why the exceptions to article XXIV include only the articles listed, or why article XIX is not a listed exception. Each of the exceptions listed in paragraph 8 of article XXIV was either well-established in pre-GATT international law or a provision that offered temporary relief from immediate problems of the early post-war era.[67] In contrast, safeguard measures, which are temporary by design,[68] were not an established part of pre-GATT trade agreements.[69] The contracting parties therefore simply may have overlooked article XIX as an exception to article XXIV. The absence of any discussion in the negotiating history of the article XXIV exceptions suggests that the negotiators gave little consideration to the list of exceptions.[70]

On the other hand, the contracting parties may have excluded article XIX from the article XXIV exceptions deliberately. Article XIX has few restraints; countries can decide unilaterally the necessity for safeguards and can impose them

67. *See supra* notes 43-46 and accompanying text.

68. GATT requires contracting parties to apply safeguards only "to the extent and for such time as may be necessary to prevent or remedy such injury." GATT, *supra* note 1, art. XIX, para. 1(a).

69. *See supra* note 46.

70. *See supra* note 44 and accompanying text.

without any kind of prior GATT approval.[71] Perhaps the contracting parties perceived the exception as susceptible to abuse and feared that countries operating under the guise of a regional arrangement might invoke a safeguards exception to limit the removal of trade barriers to only some imports, while retaining significant barriers as "safeguards" on other imports.[72] Such a sham effectively could operate as a GATT-forbidden preference arrangement. The final version of GATT, however, contains other provisions in the paragraph 8 list that are as unrestricted as article XIX.[73] For example, article XII, like article XIX, allows countries seeking to impose the trade

71. *See* GATT, *supra* note 1, art. XIX.

72. Industries and their employees often claim injury due to trade obligations or unforeseen developments. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 539. Those industries assert that freer trade policies have caused them "to bear an undue proportion of the costs for society's general gains." *Id.* The plight of such noncompetitive industries arouses substantial political sympathy and creates pressures for protection. *Id.* at 540.

73. In addition to fearing the "openness" of article XIX, it is possible that the contracting parties may have excluded article XIX from paragraph 8's list of exceptions because tariffs and quotas have different effects on imports. Article XIX authorizes both tariffs and quotas as a safeguard measure. Quotas, or quantitative restrictions on the import of a product, tend to burden each importer in proportion to the importer's share of the total imports of the product, because the quota usually makes each importer bear a pro-rata share of the reduction in imports. *See* GATT, *supra* note 1, art. XIII 2(c) (requiring that countries imposing quotas do so nondiscriminatorily, either by seeking agreement with supplying countries about allocation of quota shares or by allotting quota shares proportionally among substantial suppliers of imports). Suppose, for example, that the United States imports 1000 heavy motorcycles per year, that 900 of the vehicles originate in Japan, which does not have a free trade arrangement with the United States, and that 100 come from Canada, which has a free trade arrangement with the United States. A United States quota limiting heavy motorcycle imports to 500 usually will be construed to burden Japan and Canada in proportion to their respective shares of the import market—allowing 450 Japanese and 50 Canadian motorcycles to enter the United States. Thus, members of regional arrangements will bear the quota burden in proportion to their share of an import market.

Tariffs, on the other hand, do not have the same proportional effect. If a country imposes flat safeguard tariff measures against all countries including its regional arrangement partners, those partner countries, which formerly imported without any tariff at all, will carry a proportionally greater burden. This is so because the imports of third countries likely have been subject already to some tariffs; the additional cost to third country imports therefore will be the difference between the previous and the new safeguard tariff rates. Member countries' imports, however, suddenly will have the burden of the entire safeguard tariff to carry. Thus, safeguard tariffs do not increase trade restriction burdens proportionally measured against the market conditions that exist at the time the safeguard is imposed, but rather unfairly affect member countries. This suggests that the GATT contracting parties may have thought that the imposition of safeguard tariffs against member countries would be un-

barriers to act unilaterally, without preliminary approval by the GATT contracting parties.[74]

A better counterargument to the view that the drafters deliberately excluded article XIX asserts that the drafters never intended the paragraph 8 list of exceptions to be exhaustive. One commentator observes that parties to a regional trade arrangement probably feel entitled to invoke other GATT articles as exceptions even though the exceptions do not to appear in paragraph 8(b).[75] Article XXI, for example, states that parties may not construe a part of the GATT to require any nation to act contrary to the protection of national security interests or United Nations obligations.[76] Article XXIV also must allow members of a regional trade arrangement to impose barriers against each other for reasons of national security. The likelihood that parties would not provide exceptions for a nation's

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fair and therefore intentionally omitted article XIX safeguards as an exception to article XXIV.

74. GATT, *supra* note 1, arts. XI, XII.

One commentator argues that article XIX is an impermissible exception to article XXIV, because nations enter regional agreements to prod each unproductive domestic industry to restructure its operations and "concentrate[s] on those areas where it has a comparative advantage. Note, *supra* note 46, at 103. Permitting safeguard protection even *after* the implementation of a regional trade arrangement, the argument goes, allows nations to coddle uncompetitive domestic industries and to decrease their ability to compete effectively in the expanded market. Such coddling, the argument concludes, "substantially undermine[s] the economic goal of the signatories." *Id.* at 103 (quoting 1 MINISTER OF SUPPLY AND SERVICES CANADA REPORT: ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA 315 (1985)). This view therefore rejects safeguard exceptions to article XXIV requirements once the regional arrangement is fully implemented. *Id.* at 103-04 (advocating that safeguards be available against regional arrangement partners only during transition period, as in Australia-New Zealand Trade Agreement). The GATT currently allows the impostion of safeguards during the transitional period leading to implementation. *Id.* at 105-07. Most commentators agree that the full requirements of article XXIV, paragraph 8 do not apply during the transitional period. *See, e.g.*, Raworth, *supra* note 38, at 270.

An opposing view that is more realistic recognizes that some industries have difficulty adjusting to regional trade agreements and that these difficulties necessitate the continuing availability of safeguards. Many free trade agreements allow parties to employ safeguards beyond the transitional period but eventually restrict their use. Raworth, *supra* note 38, at 270. Some of these restrictions require the member countries to explore alternatives with each other before applying safeguards. Another restriction permits unilateral application of safeguards during a transitional period, but requires multilateral authorization to impose safeguards later. *Id.*

75. *See* J. ALLEN, THE EUROPEAN COMMON MARKET AND THE GATT 198-99 (1960) (arguing that parties should consider article XVIII among the GATT's exceptions).

76. *See id.*

sovereign right to provide for its own security seems remote, at best, even though article XXI is not a listed exception to article XXIV.[77] Thus, by analogy, the GATT contracting parties probably did not intend to require a country to surrender the sovereign right to protect industries vital to its economy in an emergency situation. An examination of GATT policy bolsters this interpretation.

B. Practical Advantages of an Article XIX Exception

A number of practical policy considerations support interpreting article XXIV to include an article XIX exception. The GATT permits regional trade arrangements based on the generally-held view that such agreements facilitate trade among constitutent territories and are consistent with the general purpose of GATT to eliminate trade barriers among all GATT contracting parties.[78] The willingness of many contracting parties to reduce trade barriers in a limited regional arrangement to a lower level and earlier than they would on a world-wide basis[79] demonstrates the usefulness of regional arrangements in achieving the GATT goals. Practical analysis therefore must weigh the benefits of regional agreements as a stepping stone toward world-wide reductions in trade barriers against the costs of regionalism. The principal cost of regional arrangements is that they abrogate the MFN principle by allowing members to favor each other over nonmembers.[80] The inclusion of article XXIV in the GATT agreement indicates that the MFN principle must yield to the political reality that many countries will move toward a significant reduction of trade barriers only by beginning on a regional basis—with a few, rather than all, trading partners.

A parallel argument suggests that article XXIV's remove-all-barriers requirement must yield to the political reality that many nations simply will refuse to enter into regional trade arrangements unless they can invoke safeguard measures to protect domestic industries that face serious injury from import competition. Many countries entering into regional arrangements evidently have felt that some industries have difficulty adjusting and that these difficulties necessitate the continuing

77. *See* GATT, *supra* note 1, art. XXIV, para. 8.
78. *See supra* note 4.
79. *See supra* note 27 and accompanying text.
80. *See supra* notes 21-23 and accompanying text.

availability of safeguards.[81] If the benefits of freer trade in a regional arrangement outweigh the costs of allowing a safeguards exception, perhaps article XXIV should bend with the "strong wind"[82] of international practice and allow a safeguards exception. After years of looking the other way when contracting parties form regional arrangements that allow some safeguards,[83] the GATT should recognize the practice of many countries.[84] By explicitly recognizing a safeguards exception, the contracting parties can clarify the GATT and maintain the credibility of the GATT system.

In sum, because the GATT text and history do not clearly preclude an article XIX exception to article XXIV, and because most nations entering into regional trade arrangements have retained authority to impose some safeguards, the contracting parties should amend the GATT explicitly to allow safeguard measures as an article XXIV exception or, or at a minimum, deem them authorized in the GATT's present form.[85] Such an interpretation or amendment would make article XXIV more attuned to the realities present when regional arrangements are formed by authorizing terms more acceptable to countries considering such arrangements. Moreover, such an interpretation is necessary to make article 1102 of the Canada-United States FTA legal under the GATT. Recognizing a safeguards exception, however, is not sufficient in itself. The legality of an Article XIX exception will depend on its proper application.

III. APPLICATION OF AN ARTICLE XIX EXCEPTION TO ARTICLE XXIV

Interpreting or amending article XXIV to include article XIX safeguard measures among the accepted exceptions to article XXIV's basic requirement that members of a regional trade arrangement eliminate substantially all trade barriers leaves open the question of how to apply the exception. The Canada-

81. *See supra* note 51 and accompanying text.

82. *See* Haight, *supra* note 20, at 399.

83. *See supra* notes 38-39 and accompanying text (noting that GATT contracting parties have accepted all proposed FTAs despite nonconformance with GATT rules).

84. *See supra* note 51 (listing major regional arrangements that retain safeguard provisions).

85. Professors Jackson and Davey view de facto amendment of GATT, at least in the context of recognizing tariffs as a legitimate means to rectify balance of payment problems, as "dangerous," but do not explain their view. *See* J. JACKSON & W. DAVEY, *supra* note 8, at 876.

United States FTA suggests that Canada or the United States *may* apply safeguards against each other, but the FTA does not say that the two *must* apply the safeguards against each other when they invoke safeguards against other countries. Indeed, article 1102 of the agreement states that a member country *must not* apply safeguards when the other member is only a small part of the problem. A careful reading of GATT articles XIX and XXIV and consideration of GATT policy reveal that safeguards *must* apply to both members and nonmembers of a regional trade arrangement. In other words, parties must apply the safeguards according to the MFN principle.

A. THE REQUIREMENTS OF ARTICLE XXIV AND ARTICLE XIX

Article XXIV, paragraph 8, does not indicate whether a contracting party invoking one of the article's exceptions must apply the resulting trade barriers to both members and nonmembers of a regional trade arrangement. Paragraph 8 provides only that the exceptions apply "where necessary."[86] By not specifically requiring that measures imposed against nonmembers must be imposed against members of the regional agreement as well, this language creates the impression that the acting state may elect to impose the measures only against nonmember states.[87]

Yet article XXIV also states that the exceptions include "those permitted" under the articles listed as exceptions.[88] The language *those permitted* appears to require following the rules of each article to qualify for an exception. For example, a contracting party may impose quantitative restrictions under article XI, that is, outside of an article XXIV regional arrangement only in specifically defined situations, such as temporarily to

86. GATT, *supra* note 1, art. XXIV, para. 8.

87. The *permitted* language of the paragraph 8 parenthetical appears, at first glance, to support this view. It states: "except, where necessary, those *permitted* under Articles XI, XII, XIII, XIV, XV and XX." GATT, *supra* note 1, art. XXIV, para. 8(a)(i), 8(b) (emphasis added).

Another possible interpretation is that nations must apply the exception articles according to the general principle of MFN. For instance, some members of the working party on the EEC agreements with the EFTA countries maintain that nonapplication of safeguard measures against member states violates the MFN requirement of GATT. *See supra* notes 54-58 and accompanying text. This interpretation fails to recognize that article XXIV, by definition, is an exception to MFN, and that the principle of MFN therefore is not an adequate justification for a requirement that parties apply the exceptions nondiscriminatorily.

88. GATT, *supra* note 1, art. XXIV, para. 8(a)(i), 8(b).

restrict exports during critical shortages of essential products.[89] Thus, a member of a regional arrangement could impose article XI quantitative restrictions on another member only after satisfying the article XI criteria. Under this reading, the *where necessary* language simply might underscore the restraint with which states must apply the exceptions.

The best argument therefore is that the exceptions to article XXIV apply according to the rules that normally govern their application outside of a regional trade arrangement.[90] If

89. GATT, *supra* note 1, art. XI, para. 2(a).

90. One commentator has suggested, using a similar argument, the imposition of quantitative restrictions for balance of payment purposes in regional arrangements. *See* P. LORTIE, ECONOMIC INTEGRATION AND THE LAW OF GATT 9-11 (1975). Paragraph 5 of article XXIV states that GATT provisions "shall not prevent . . . the formation of a customs union or of a free-trade area," thus creating the impression that article XXIV waives not only MFN but also all other GATT requirements. P. LORTIE, *supra*, at 9. "Such a view, however, overlooks one important fact—that is, that quantitative restrictions are outlawed in GATT unless required by a set of very specific economic conditions." *Id.* Article XIII's requirement that parties apply quantitative restrictions according to the MFN principle states:

> No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similary prohibited or restricted.

GATT, *supra* note 1, art. XIII, para 1.

Authorized exceptions to article XIII are in article XIV. Because article XIV does not provide an exception for regional trade arragements, they are not authorized exceptions to article XIII requirements. Thus, elimination of quantitative restrictions against members discriminates against nonmembers in violation of article XIII. P. LORTIE, *supra*, at 10.

This issue arose at the formation of the EEC. *See* G. PATTERSON, DICRIMINATION IN INTERNATIONAL TRADE 191-95 (1966). The Treaty of Rome establishing the EEC authorizes a member country to apply quantitative restrictions against trade with third countries, but not against other member countries. *See id.* Members of the EEC interpreted this to permit a member country "to apply quantitative restrictions against third countries, even when such member was not itself in balance of payments difficulties, provided some other member was." *Id.* at 192. Third countries, led by the United States and Canada, objected, arguing "that if and when the time came that members of the Common Market were so thoroughly integrated that they could be regarded as a single economic unit, . . . then they might . . . properly have a common policy on quantitative restrictions against outsiders." *Id.* at 193. In the end, the working party reserved the issue, deciding instead that countries could bring a case before the contracting parties if the issue arose. *Id.* at 194. The issue arose again at the time of the Stockholm Convention establishing the European Free Trade Area and the Montevideo Treaty establishing the Latin American Free Trade Association. *Id.* at 194-95. In both instances, the working parties agreed to reserve a formal conclusion on the issue. *Id.* at 195. Thus, GATT permits a common policy of quantitative restrictions only when

excluding regional arrangement members causes the measure to violate its authorizing section then nothing in article XXIV cures that violation. According to this reasoning, an article XIX exception requires nondiscriminatory application of safeguard measures because the application of article XIX outside of a regional trade arrangement implicitly includes an MFN requirement.[91] Most-favored-nation application of article XIX means that whenever Canada or the United States imposed safeguards against a third country, they also would have to apply safeguards against each other.[92]

B. THE PRACTICAL CONSEQUENCES OF APPLYING AN ARTICLE XIX EXCEPTION ACCORDING TO THE MFN PRINCIPLE

1. Analogy to GATT Article XX

The practical consequences of interpreting article XXIV to include an article XIX exception also support the validity of requiring nondiscriminatory application of safeguards by members of regional agreements. The advantages of nondiscriminatory application are most evident when considering the application of article XX in the context of a regional trade arrangement.[93] Article XXIV lists article XX as one of the exceptions to the rule against trade barriers among members of a regional arrangement.[94] Article XX exempts trade restrictions that are "necessary" to protect national health and safety interests.[95] A trade restriction imposed for these reasons should apply against any regional trade partner if it applies against any third party country. A nation that excludes an outsider's product on grounds of public health, safety, or morality must apply the same standards to imports from a regional partner. The offending import is either unsafe from both countries or from neither—an unsafe product from a third country does not become safe because it comes from a regional partner. Thus, no imaginable situation would justify an article XX restriction against third countries without imposing the restrictions against regional arrangement members as well.

Similar logic applies to article XIX. Countries impose arti-

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parties to a regional arrangement integrate as thoroughly as a single economic unit. *Id.*

91. *See supra* note 49 and accompanying text.
92. *See id.*
93. *See* GATT, *supra* note 1, art. XX.
94. *See supra* note 7.
95. GATT, *supra* note 1, art. XX.

cle XIX safeguard measures when a "product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers."[96] States must perceive that an injury results from increased imports of the specified product. Regardless of the country of origin, all imports of the product threaten or cause injury to domestic producers in proportion to each country's share of the market.[97] Thus, if the United States determines that cheap, imported tennis shoes injure the domestic shoe industry, shoes made in Brazil and Canada both pose a threat, even if one country holds a majority share of the shoe market.[98] If a member of a regional trade arrangement applies safeguard measures only against countries outside of the regional trade arrangement, countries within the regional arrangement may continue their exports to the injured member country at the same or even increased rates. Such discrimination is unfair to nonmember countries who contribute proportionally no more to the domestic producer's injuries than the member countries do.

Not only are all offending imports of the product equally responsible for injury to the domestic industry, but discrimination between import suppliers means that restrictions on nonmember imports must be greater to compensate for the lack of restriction on imports from member countries. Even if the member countries do not increase exports of the product to the injured country in response to the restrictions on nonmembers, the injured producers still suffer injury from the continuing flow of the product into the country from the other member producers. As a result, the barriers against nonmembers must stand taller and last longer to achieve the same amount of protection as restrictions on *all* imports of the product would achieve.[99] If imports from members increase to fill the gap in the market left by the decrease in imports from nonmembers,

96. GATT, *supra* note 1, art. XIX, para. 1(a)

97. Because *total* imports cause the problem, imports from each country share responsibility for the problem in proportion to their share of total imports. The MFN principle requires each importing country to bear a proportionate share of the burden created by the safeguard. *See supra* note 18 and accompanying text.

98. This illustration does not attempt to account for special considerations raised by imports from developing countries. Although such considerations may be appropriate under the GATT, they are beyond the scope of this discussion.

99. The Canada-United States FTA safeguard provision permits one party to include the other party in the global restriction if there is a subsequent

however, participating nations might need to impose even greater restrictions on outsiders. Thus, when countries apply protective measures only against nonmembers, a regional arrangement begins to resemble exactly the kind of preferential treatment that the GATT sought to eliminate.[100] Discriminatory application of safeguards benefits regional partners at the expense of nonmember competitors, who remain burdened by trade restraints. The GATT drafters intended contracting parties to use article XIX defensively in emergencies, not offensively to gain unfair trade advantages.[101]

2. The Positive Effects of Nondiscriminatory Safeguard Application

Imposing safeguards on member countries as well as nonmembers would yield positive results. In addition to eliminating the unfair impact of such measures on outside countries, nondiscrimination would foster the restrained use of safeguard measures. Regional partners would stand with nonmember countries in opposition to the safeguards of any one member. An article XIX exception requirement would induce regional partners to work with other countries to insure that all countries imposing safeguards applied them, consistent with GATT intentions, only in the most pressing circumstances as a *tempo-*

"surge in imports . . . from the other Party that undermines the effectiveness of such action." Canada-U.S. FTA, *supra* note 3, art. 1102, para 2.

100. *See supra* notes 29-30 and accompanying text.

101. The same reasoning applies to the remaining exceptions in article XXIV, paragraph 8. Paragraph 2(c) of article XI authorizes trade restrictions when imports impede a domestic price-support program as, for example, when a greater-than-proportional amount of imports force a government to buy up a greater share of the product. Because all imports contribute to the problem, restrictions should affect each supplier in proportion to its market share. Unless governments impose restrictions against regional partners as well as outsiders, they can achieve the necessary import reduction only by reducing the trade of outsiders. Thus, the action will require a greater reduction in outsider exports than would be necessary if the restriction applied to regional partner suppliers who are also responsible for the government's adverse situation. If regional partners increase exports to fill the gap, the government must impose even greater restrictions on outsiders to meet the import reduction objective.

This reasoning also applies to articles XII through XV, which allow emergency measures for balance of payments ("BOP") reasons. The provisions allow trade and payment restrictions to reduce spending when domestic spending on foreign purchases exceeds available reserves. When the government imposes BOP restrictions only on outsiders, those restrictions must be severe enough to achieve import reduction objectives, and even more restrictive if regional trading partners are free to replace imports from outsiders. Again, there is no justification for requiring outsiders to bear more than their proportional share of the BOP restriction burden.

rary measure.[102]

3. An Exception to the Nondiscriminatory Application Requirement

The unfairness problem does not arise in one situation: where parties design a restriction on imports to protect a region-wide industry. Because a region-wide industry operates across national boundaries within the territory of the regional arrangement, partners to the arrangement legitimately may act as a single entity to block imports from a nonpartner country that cause or threaten serious injury to a region-wide industry.[103] Thus, all members of the regional agreement could impose identically high tariffs on offending imports of the product to the entire region. This will occur in customs unions that have implemented fully the customs unions mechanisms or in a free trade area which has developed to the point that it operates like a customs union, at least in the product sector for which a member country seeks safeguards. In such a case, the GATT should not require the regional trading partners to impose the safeguard measures against each other, because the threshold requirement of region-wide "serious injury" is fairly high.[104]

In a sense, then, article XIX is a type of transitional exception. Industries within one member country to a regional trade arrangement will require safeguard protection from the imports of the country's regional partners only when partner nations are forming a regional arrangement and industries operate primarily within natural boundaries. Once the full mechanisms of a customs union take effect or free trade agreement partners integrate their economies to the point that industrial products from a particular sector flow freely throughout the region, all imports from the product sector are subject to a common external tariff, and there is a common au-

102. *See supra* notes 45-49 and accompanying text.

103. Professor Lortie, in his argument for the nondiscriminatory application of quantitative restrictions for balance of payment purposes, agrees with this exception when the members of the regional arrangement operate as a "single economic unit." P. LORTIE, *supra* note 90, at 10-11.

104. Trading partners that are this integrated, however, must then give up the right to apply safeguards against each other. If countries do not apply safeguards against their regional trading partners, other GATT contracting parties should require countries invoking article XIX to forfeit the right to impose safeguard measures against their regional trading partners in the future without submitting the matter for reconsideration to the GATT contracting parties.

thority with power to analyze the import-injury in all countries. In such a circumstance, no industry is truly domestic and the GATT need not require that regional trading partners apply safeguard measures against each other.[105]

In sum, the language of article XXIV suggests following the conditions of each individual article permitting an exception. Because the application of article XIX must incorporate the MFN principle outside the regional arrangement context, MFN also should apply when article XIX is invoked as an exception to article XXIV. Sound policy considerations also favor nondiscriminatory application of an article XIX exception. Article 1102 of the Canada-United States FTA therefore violates the GATT because it allows the United States and Canada to apply safeguard measures against third countries without also applying them against each other. Canada and the United States could comply with GATT, however, if by agreement or practice they applied safeguards against each other whenever they invoke safeguards against third countries. Such a requirement should remain in effect until the economies of the two countries become so integrated that their industries operate across the national border, in much the same way as United States industries operate across state borders, or as if the United States and Canada had formed a customs union covering the industry that requires protection. At that point, if the threat of serious injury from outside imports endangers an industry that is operating in both Canada and the United States, it would not make sense for the two countries to apply safeguards against each other. To achieve this status, Canada and the United States would have to impose a common external tariff on the product(s) involved, allow duty-free circulation of the product between Canada and the United States, and create a common authority empowered to determine import-injuries to the two countries. The Canada-United States FTA does not contain such mechanisms; the region-wide industry exception to MFN requirements in article XIX safeguards therefore cannot apply to the United States and Canada without further

105. Nevertheless, the need for transitional safeguards may continue beyond the time of an interim agreement that leads to the formation of a customs union or free trade area, the elimination of all trade barriers, and even the full implementation of the regional trading agreement. Many countries entering regional arrangements, including the United States and Canada in their free trade agreement, have included safeguard provisions in regional trade agreements because they foresee this possibility.

agreement between them and corresponding changes to each country's laws.

CONCLUSION

Article 1102 of the new Canada-United States FTA provides that each country may apply emergency safeguards against the other in certain circumstances. The GATT legality of this portion of the agreement is unclear. GATT article XXIV, which governs regional trade arrangements, does not expressly provide article XIX safeguards as an exception to the requirement that regional arrangement members remove substantially all trade barriers among the members. On the other hand, even if article XIX safeguards are a legitimate exception to article XXIV requirements, the Canada-United States FTA raises another potential problem of GATT legality by giving each country the option of not applying safeguards against each other when they apply safeguards against third countries. This power to discriminate arguably violates the requirements of article XIX, which scholars agree has an implicit MFN requirement.

Because the article XXIV exceptions to regional arrangement requirements apparently are not exhaustive, and because policy considerations reveal advantages to incorporating an article XIX exception into article XXIV, the GATT should bow to the need that many countries have felt for a safeguards exception in regional trade arrangments and should recognize the legitimacy of an article XIX trade restrictions exception. The GATT should require, however, that countries invoking article XIX safeguards apply them according to the requirements of article XIX itself. Despite the unclear language of articles XIX and XXIV on this important point, an analysis of the unfair results that would follow from the discriminatory application of safeguards supports the conclusion that safeguards imposed by members of a regional agreement must apply according to the MFN principle, as they must outside the context of regional arrangements. Thus, although the Canada-United States FTA provision that allows the imposition of safeguard measures against Canada does not require the nondiscriminatory application of safeguards to each other as well as to outsiders, the two countries should comply with GATT by applying the safeguards against each other whenever they impose them against other

countries, until the economies of the two countries become fully integrated.

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